**MORTEZA NASERRANJBAR v. PP**

COURT OF APPEAL, PUTRAJAYA
AZIAH ALI JCA
TENGKU MAIMUN JCA
ABDUL RAHMAN SEBLI JCA
[CRIMINAL APPEAL NO: W-05-185-07-2013]
12 DECEMBER 2014

***CRIMINAL LAW:*** *Dangerous Drugs Act 1952 – Section 39B(2) – Trafficking – Prima facie case – Whether established – Drugs found in sling bag passed from appellant to another – Whether appellant had knowledge that there were drugs in bag – Whether appellant's defence consistent with crown witness – Whether trial judge misdirected himself and failed to administer Radhi's direction – Whether there was fair and just assessment of defence – Whether prosecution practised selective prosecution when withdrawing charge against accused person and turning him into crown witness – Federal Constitution, art. 145(3) – Whether conviction of appellant safe – Whether appellant acquitted and discharged*

***CRIMINAL PROCEDURE:*** *Appeal – Conviction and sentence – Trafficking in drugs – Dangerous Drugs Act 1952, s. 39B(2) – Prima facie case – Whether established – Whether trial judge failed to undertake maximum evaluation of defence case – Whether trial judge misdirected himself – Radhi's direction – Whether there was fair and just assessment of defence – Whether trial judge's conclusion on defence fatally flawed – Whether conviction of appellant unsafe – Whether appellant acquitted and discharged*

The appellant was charged in the High Court jointly with one Mohammad Haddadi for trafficking in dangerous drugs to wit, 858.5 grams of methamphetamine, an offence punishable under s. 39B(2) of the Dangerous Drugs Act 1952 ('the Act') read together with s. 34 of the Penal Code. Acting on information, SP6 and his team were outside the arrival hall of Kuala Lumpur International Airport ('KLIA') when the appellant was seen carrying two bags, one sling bag (exh. P18) and one trolley bag (exh. P31), at the taxi stand. SP6 tailed the appellant until he reached Hotel Fortuna and checked into room 603. The next day, Mohammad Haddadi was seen entering room 603 without any bag and left ten minutes later with P18 heading towards Jalan Ampang where he was subsequently arrested at the Vista Damai Condominium. Upon examination of P18, eleven plastic packets were found which was confirmed by the chemist to contain methamphetamine forming the subject matter of the charge. The appellant was arrested in room 603 Hotel Fortuna on the same day, but nothing incriminating was found on him or in the room. Subsequently, the charge against Mohammad Haddadi was withdrawn and he turned crown witness ('SP1'). At the end of the prosecution's case, the High Court invoked s. 37(d) and s. 2 of the Act to find a *prima facie* case against the appellant. The appellant, in his defence, submitted that he had no knowledge of the drugs. He further testified that he had come to Malaysia for holidays and that one

A Arash had asked him to pass P18 to SP1. The trial judge concluded that the appellant's defence was one of bare denial and convicted and sentenced the appellant to death. Hence, this appeal. The appellant submitted that (i) the trial judge had failed to undertake a maximum evaluation of the prosecution's case and the defence case and had failed to sufficiently consider that the real B trafficker was SP1 and/or Arash and (ii) that there had been a failure of justice when the prosecution practised selective prosecution in withdrawing the trafficking charge against SP1.

**Held (allowing appeal)**
**Per Tengku Maimun JCA delivering the judgment of the court:**

C **(1)** The trial judge had erred in describing the defence of the appellant as a bare denial and in failing to apply *Radhi's* direction, such that there was no fair and just assessment of the defence. Arash was not a fictitious person. The appellant had given an explanation how he came to be in possession of the bag P18 and his defence was consistent with the D evidence of SP1. The appellant's defence could not be said to be a simple denial of the evidence connecting him to P18. Had the trial judge asked himself the correct questions, namely whether Arash was a real person or whether he was a figment of the appellant's imagination and whether Arash and/or Haddadi were the real traffickers, the trial judge E would not have concluded that the defence of the appellant was a bare denial. In the circumstances, the trial judge had misdirected himself. His Lordship's failure to administer upon himself the *Radhi's* direction had rendered his conclusion on the defence fatally flawed. (paras 14, 15 & 19)

F **(2)** The appellant had testified that he was merely obliging his close friend and neighbour, Arash, in bringing the bag to SP1. SP1 had confirmed the appellant's version by taking the bag P18 from the appellant as per the arrangement made by Arash. In this scenario, coupled with the fact that the investigating officer SP10 agreed that SP1 was the real trafficker, G it was alleged that there had been a complete failure of justice caused by the selective prosecution when the charge against SP1 was withdrawn. However, taking into consideration art. 145(3) of the Federal Constitution, there was no basis to find that the prosecution had practised selective prosecution in withdrawing the charge against SP1. H The second ground of appeal was therefore not sustainable. (paras 20 & 21)

**(3)** Given the clear evidence of SP1 and SP10 that Arash was a real person and given the acceptance of SP10 that SP1 was the real trafficker, the conviction of the appellant was found to be unsafe. Applying *Radhi's* I direction, the proper order was to acquit the appellant. (paras 23 & 24)

***Bahasa Malaysia*** *Translation Of Headnotes*

Perayu telah dituduh di Mahkamah Tinggi bersama dengan satu Mohammad Haddadi untuk pengedaran dadah berbahaya iaitu, 858.5 gram methamphetamine, satu kesalahan yang boleh dihukum di bawah s. 39(B(2) Akta Dadah Berbahaya 1952 ('Akta') dibaca bersama dengan s. 34 Kanun Keseksaan. Bertindak atas maklumat yang diberi, SP6 dan pasukannya telah berada di luar dewan ketibaan Lapangan Terbang Kuala Lumpur ('KLIA') di mana perayu dilihat membawa dua beg, satu beg sandang (eks.P18) dan satu beg troli (eks. P31), di tempat menunggu teksi. SP6 telah mengekori perayu sehingga dia tiba di Hotel Fortuna dan memasuki bilik 603. Keesokan harinya, Mohammad Haddadi telah dilihat memasuki bilik 603 tanpa apa-apa beg dan telah meninggalkan hotel tersebut dengan P18 sambil menuju ke arah Jalan Ampang di mana dia telah ditahan di Vista Damai Condominium. Apabila P18 diperiksa, sebelas bungkusan plastik telah dijumpai yang telah disahkan oleh ahli kimia mengandungi methamphetamine yang membentukkan hal perkara pertuduhan. Perayu ditahan di bilik 603 Hotel Fortuna pada hari yang sama, tetapi tiada apa-apa yang menunjukkan yang perayu bersalah dijumpai pada tubuh badannya atau dalam bilik tersebut. Kemudiannya, pertuduhan terhadap Mohammad Haddadi telah ditarik balik dan dia dijadikan sebagai saksi utama ('SP1'). Pada akhir kes pendakwaan, Mahkamah Tinggi telah menggunakan s. 37(d) dan s. 2 Akta untuk membuktikan kes *prima facie* terhadap perayu. Perayu, dalam pembelaannya, berhujah bahawa dia tidak mempunyai pengetahuan berkenaan dadah-dadah itu. Perayu juga memberi keterangan bahawa dia telah datang ke Malaysia untuk bercuti dan satu Arash telah memberikannya P18 untuk diserahkan kepada SP1. Hakim bicara telah memutuskan bahawa pembelaan perayu adalah penafian semata-mata dan telah mensabitkan dan menjatuhkan hukuman mati ke atas perayu. Oleh itu, rayuan ini. Perayu menghujahkan bahawa (i) hakim bicara telah gagal untuk menjalankan penilaian maksimum ke atas kes pendakwaan dan kes pembelaan dan telah gagal untuk mempertimbangkan dengan secukupnya bahawa pengedar sebenarnya adalah SP1 dan/atau Arash dan (ii) bahawa terdapat ketidakadilan apabila pihak pendakwaan mengamalkan pendakwaan secara berpilih apabila menarik balik pertuduhan pengedaran terhadap SP1.

**Diputuskan (membenarkan rayuan)**
**Oleh Tengku Maimun HMR menyampaikan penghakiman mahkamah:**

**(1)** Hakim bicara telah terkhilaf apabila menggambarkan pembelaan perayu sebagai penafian semata-mata dan dalam kegagalan menggunapakai '*Radhi's* direction', sehingga tiada penilaian pembelaan yang adil dan saksama. Arash bukan seseorang yang fiksyen. Perayu telah memberikan penjelasan bagaimana beg P18 berada dalam milikannya dan pembelaannya adalah konsisten dengan keterangan SP1. Pembelaan perayu tidak boleh dikatakan sebagai penafian keterangan yang menghubungkannya ke P18. Jika hakim bicara telah mempersoalkan

dirinya sendiri dengan soalan-soalan yang sesuai, seperti sama ada Arash betul-betul wujud atau adalah satu khayalan imaginasi perayu dan sama ada Arash dan/atau Haddadi adalah pengedar yang sebenarnya, hakim bicara tidak akan mencapai keputusan bahawa pembelaan perayu adalah penafian semata-mata. Dalam keadaan ini, hakim bicara telah tersalah arah. Kegagalan hakim bicara untuk mentadbirkan ke atas dirinya '*Radhi's* direction' telah menyebabkan kesimpulannya berkenaan pembelaan menjadi amat cacat.

**(2)** Perayu telah memberi keterangan bahawa dia hanya menolong kawan rapat dan jirannya, Arash, dengan membawa beg kepada SP1. SP1 telah mengesahkan versi perayu dengan mengambil beg P18 dari perayu seperti yang dirancangkan oleh Arash. Dalam senario ini ditambah pula dengan fakta bahawa pegawai penyiasat SP10 bersetuju bahawa SP1 adalah pengedar sebenar, ia adalah didakwa bahawa terdapat ketidakadilan disebabkan pendakwaan berpilih apabila pertuduhan terhadap SP1 ditarik balik. Walau bagaimanapun, mengambil kira per. 145(3) Perlembagaan Persekutuan, tiada asas untuk mendapati bahawa pihak pendakwaan telah mengamalkan pendakwaan berpilih dalam menarik balik pertuduhan terhadap SP1. Alasan rayuan yang kedua dengan itu tidak boleh dipertahankan.

**(3)** Memandangkan keterangan jelas yang diberikan oleh SP1 dan SP10 bahawa Arash memang wujud dan memandangkan penerimaan SP10 bahawa SP1 adalah pengedar sebenar, sabitan perayu adalah tidak selamat. Menggunapakai '*Radhi's* direction', perintah yang sepatutnya dibuat adalah untuk membebaskan perayu.

**Case(s) referred to:**
*DA Duncan v. PP [1980] 1 LNS 12 FC* ***(refd)***
*Long Samat & Ors v. PP [1974] 1 LNS 80 FC* ***(refd)***
*Mohamad Radhi Yaakob v. PP [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 SC* ***(refd)***
*Yee Wen Chin v. PP & Another Appeal [2008] 6 CLJ 773 CA* ***(refd)***

**Legislation referred to:**
Dangerous Drugs Act 1952, ss. 2, 37(d), 39B(2)
Federal Constitution, art. 145(3)
Penal Code, s. 34

*For the appellant - Hisyam Teh Poh Teik (Syazlin Mansor with him); M/s Teh Poh Teik & Co*
*For the prosecution - Mohd Fairuz Johari; DPP*

*[Appeal from High Court, Kuala Lumpur; Criminal Trial No: 45-11-2011]*

*Reported by Suhainah Wahiduddin*

## JUDGMENT

**Tengku Maimun JCA:**

**[1]** The appellant was charged in the High Court Kuala Lumpur jointly with one Mohammad Haddadi for trafficking in dangerous drugs to wit, 858.5g of methamphetamine, an offence punishable under s. 39B(2) of the Dangerous Drugs Act 1952 ('the Act') read together with s. 34 of the Penal Code.

**The Prosecution's Case**

**[2]** Acting on information, on 8 December 2010, Insp Gan Chee Liang ('SP6') set up a team at the taxi stand outside the arrival hall of KLIA. At about 2.45pm, the appellant was seen at the taxi stand carrying two bags, one sling bag ('exh. P18') and one trolley bag ('exh. P31'). The appellant boarded a taxi. He carried with him bag P18 while bag exh. P31 was put inside the boot.

**[3]** SP6 and his team tailed the taxi until Bank Islam, Jalan Bukit Bintang. The appellant alighted from the taxi. The appellant went to Hotel Fortuna and checked into room 603. The police team monitored the movements of the appellant where the appellant was seen coming in and out of the hotel several times.

**[4]** The next day, on 9 December 2010 at about 6.30pm, Mohammad Haddadi was seen entering room 603 without any bag. Ten minutes later Mohammad Haddadi left the room and boarded a taxi. Mohammad Haddadi had with him the sling bag, exh. P18. Inspector Ihwan Hilmi bin Ismail ('SP7') followed the taxi. The taxi stopped at Jalan Ampang where Mohammad Haddadi got down with P18. SP7 followed Mohammad Haddadi until Vista Damai Condominium. Mohammad Haddadi was arrested by SP7 at the front of the lift of the condominium.

**[5]** SP7 checked P18. He found some clothes inside. He also found two secret compartments in P18 which were stitched. Upon removal of the stitches, SP7 found 11 plastic packets. The plastic packets were confirmed by the chemist ('SP2') to contain methamphetamine forming the subject matter of the charge. Inside the condominium unit where Mohammad Haddadi stayed, SP7 seized three wet towels which also contained drugs.

**[6]** The appellant was arrested by Insp. Didi Fairuz bin Zainal Abidin in room 603 Hotel Fortuna at about 7.50pm on 9 December 2010. Nothing incriminating was found on him or in the room.

**[7]** As mentioned earlier, Mohammad Haddadi was charged together with the appellant. However, about one year and seven months later, the charge against Mohammad Haddadi was withdrawn and Mohammad Haddadi turned crown witness ('SP1').

**[8]** At the end of the prosecution's case, the High Court invoked s. 37(d) and s. 2 of the Act to find a *prima facie* case against the appellant. The appellant was called upon to enter his defence.

**[9]** The appellant gave evidence under oath. The essence of his defence was that he had no knowledge of the drugs. The appellant testified that he came to Malaysia for holidays and that Arash, his close friend and neighbour had asked him to pass the sling bag, P18 which contained some clothes, to SP1. The appellant had opened the bag and he saw some clothes inside. He trusted Arash and he had no reason to be suspicious. The appellant denied that he had put the clothes in the bag P18.

**[10]** It was further the evidence of the appellant that when he reached the hotel, he contacted Arash and Arash had told him that he (Arash) would give the appellant's phone number to SP1. SP1 then called the appellant to come and collect the bag P18.

**[11]** At the end of the defence case, the High Court made the following findings:

1. Tertuduh datang dari Iran ke Malaysia untuk bercuti. Di samping itu dia menerima permintaan daripada Arash sahabat karibnya di Iran supaya menyerahkan bag P18 kepada SP1 Haddadi. Bag itu berat. Jika bag itu mengandungi pakaian, ia adalah ringan. Inferens yang boleh dibuat adalah tidak mungkin Tertuduh tidak mengetahui kandungan bag P18 tersebut. Kes *Tan Ah Tee v. PP* [1980] 1 MLJ 49 terpakai.

2. Dadah berbahaya yang dikemukakan di Mahkamah adalah dadah berbahaya yang sama yang dirampas dari bag P18. …

3. Melihat kepada demeanour Tertuduh semasa memberi keterangan adalah meragukan. Dari pemerhatian semasa memberi keterangan, Mahkamah berpendapat penjelasan yang diberikan oleh Tertuduh adalah tidak jujur. Rujuk kes *PP v. Ismail Mohd Azmi* [2010] 1 MLJ 108.

4. SP1 menafikan bag P18 itu dia punya. Semasa di bilik Hotel Fortuna bilik 603, SP1 mendapati bag P18 itu telah diisi oleh Tertuduh dengan kandungan yang terdapat di dalamnya. Tidak mungkin Tertuduh tidak mengetahui kewujudan dadah berbahaya tersebut dalam P18 kerana ia terdapat dalam tempat yang dijahit dengan khusus (special compartment).

5. Selepas meneliti pembelaan Tertuduh, Mahkamah mendapati pembelaan Tertuduh adalah penafian semata-mata. Pembelaan Tertuduh gagal menimbulkan keraguan yang munasabah ke atas kes prima facie pendakwaan.

6. Pembelaan gagal mematahkan anggapan di bawah seksyen 37(d) Akta Dadah Berbahaya 1952. ...

**[12]** The appellant was thus convicted and sentenced to death, hence the appeal before us. We had unanimously allowed the appeal and set aside the conviction and sentence. We now give our reasons.

**The Appeal**

**[13]** Encik Hisyam Teh Poh Teik, learned counsel for the appellant canvassed the following grounds of appeal:

(i) that the learned trial judge failed to undertake a maximum evaluation of the prosecution's case and the defence case and had failed to sufficiently consider that the real trafficker was SP1 and/or Arash.

(ii) that there has been a failure of justice when the prosecution practised selective prosecution in withdrawing the trafficking charge against SP1.

**[14]** On the first ground, the crux of learned counsel's submission was that the learned trial judge had erred in describing the defence of the appellant as a bare denial and in failing to apply *Radhi* direction, such that there was no fair and just assessment of the defence.

**[15]** We found merits in the submission of learned counsel. Arash was not a fictitious person and more importantly, the evidence of SP1 was consistent with the defence version. For ease of reference, the relevant part of the evidence of SP1 is reproduced below (rekod rayuan jld 1: pp. 15-17):

Q: What happened on 09/12/2010 before you were arrested?

A: I received a call from Arash from Iran to meet somebody. He gave me a phone number and asked me to call the number and say that I am from Arash. I went to collect Arash's bag. I went to the Hotel. I went inside the room. There is some cloths under the bed and he told me that it was inside the bag. After I collected the bag, I left the room. I took a taxi to go back home. Then, they (the police) arrested me in front of the lift in the condominium. …

…

Q: You received a call from Arash from Iran. Was he calling from Iran?

A: He was in Iran.

Q: You were working with somebody. Who is he?

A: He is Arash's brother named Reza.

Q: Have you seen Arash before?

A: Yes.

Q: Where?

A: In that house.

Q: When you carried the bag from Fortuna Hotel to Vista Damai, did you feel the bag heavy or light?

A: I did not pay attention to that.

A Q: You did not notice how heavy is the bag?

A: I did not think about it.

**[16]** The investigating officer (SP10) similarly confirmed the existence of Arash. The following is her evidence in examination-in-chief (rekod rayuan Jld 1: p. 69):

B Q: Siapa penyewa unit 344-5-3A tersebut?

A: Ada penama Arash menyewa di unit kondo tersebut. Saya perolehi daripada agen kondo bernama Pn. Lim Fui Siam. Namun saya dapati Arash tidak tinggal di unit kondo tersebut kerana tiada
C dokumen dan barang yang saya jumpai atas penama Arash.

Q: ...

A: …

Q: Selepas kamu tahu kondo disewa oleh Arash, ada kamu buat
D siasatan untuk kesan Arash?

A: Tidak.

**[17]** And in cross-examination the following exchanges took place (pp. 70-71: rekod rayuan jld 1):

E Q: Bila Haddadi ditangkap, beliau sedang dalam milikan P18 (Bag tangan).

A: Setuju.

Q: Dalam bag P18 dadah disembunyikan.

A: Setuju.
F

Q: Dalam siasatan kamu, dadah itu disembunyikan dalam bag itu yakni ia dijahit dalam bag itu?

A: Betul.

Q: Dalam siasatan kamu, sebelum kamu serah ASP Chandra, kamu ada
G cadang kepada TPR untuk Haddadi dilepaskan?

A: Tidak.

Q: Setuju – Haddadi ada kawalan terhadap dadah dalam bag semasa ia ditangkap?

H A: Setuju.

Q: Bila Haddadi dilepaskan dalam kes ini, adakah Puan terperanjat?

A: Terkejut.

…

I Q: Cadangan – dalam kes ini Haddadi adalah salah seorang pengedar dadah?

A: Setuju.

**[18]** Faced with the above evidence, the approach to be taken by the trial judge ought to be in line with the direction given by the then Supreme Court in *Mohamad Radhi Yaakob v. PP* [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 as explained by this court in *Yee Wen Chin v. PP & Another Appeal* [2008] 6 CLJ 773 as follows:

> [12] … In the course of cross-examining the prosecution witnesses it was extracted from PW5 that the information he had received was that Woo Kok Meng was trafficking in drugs at the place in question. The defence quite properly took advantage of this fact to demonstrate that Woo was the real trafficker and the accused was entirely innocent. The accused was clearly entitled to do this in view of the decision in *Mohamad Radhi v. Public Prosecutor* [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 SC. That case is authority for the proposition that a person charged with trafficking is entitled to an acquittal on that charge by showing that he was a mere possessor of the drugs whilst another was the true trafficker. Whenever such a defence is taken two separate exercises must be carried out by the trial judge. He must first determine as a fact whether that other is a real person or a mere figment of the accused's imagination invented for the purpose of the trial. Next, if he finds that other person to be real the judge must then determine whether that other person is the real trafficker. This is called the *Radhi* direction and must be administered by a court unto itself when such a defence is taken. See, *Sochima Okoye v. Public Prosecutor* [1995] 3 CLJ 371 CA.

**[19]** We have perused the grounds of judgment and we found that the learned trial judge had given a narration of Arash but His Lordship had failed to ask himself the correct questions as in *Radhi* direction. The appellant had given an explanation how he came to be in possession of the bag P18 and his defence was consistent with the evidence of SP1. The appellant's defence cannot be said to be a simple denial of the evidence connecting him to P18 (see *DA Duncan v. PP* [1980] 1 LNS 12; [1980] 2 MLJ 195). Had the learned trial judge asked himself the correct questions, namely whether Arash was a real person or whether he was a figment of the appellant's imagination and whether Arash and/or Haddadi were the real traffickers, the learned trial judge would not have concluded that the defence of the appellant was a bare denial. In the circumstances, we found that the learned trial judge had misdirected himself in describing the defence as a bare denial and in failing to assess the defence in a just and fair manner. And to compound to the misdirection, His Lordship's failure to administer unto himself the *Radhi* direction had rendered his conclusion on the defence fatally flawed (see *Sochima Okoye, supra*).

**[20]** Given the clear evidence of SP1 and SP10 that Arash was a real person and given the acceptance of SP10 that SP1 was the real trafficker, we found the conviction of the appellant unsafe. Applying *Radhi* direction, the proper order to make was to acquit the appellant. The determination of the first ground was thus sufficient to dispose of the appeal. For the sake of completeness, we will nevertheless proceed with the second ground of appeal.

**[21]** As against the appellant who had testified that he was merely obliging his close friend and neighbour, Arash in bringing the bag to SP1, we have SP1 who had confirmed the appellant's version by taking the bag P18 from the appellant as per the arrangement made by Arash. In this scenario, coupled with the fact that the investigating officer, SP10 agreed that SP1 was the real trafficker, there appears to be some basis in the complaint of Encik Hisyam Teh Poh Teik that there had been a complete failure of justice caused by the selective prosecution when the charge against SP1 was withdrawn.

**[22]** However, we had in mind art. 145(3) of the Federal Constitution which provides:

> The Attorney-General shall have power exercisable at his discretion to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Muslim court, a native court or a court-martial.

And the pronouncement by the Federal Court in *Long bin Samat & Ors v. Public Prosecutor* [1974] 1 LNS 80; [1974] 2 MLJ 152:

> In our view, this clause from the supreme law clearly gives the Attorney-General very wide discretion over the control and direction of all criminal prosecutions. Not only may he institute and conduct any proceedings for an offence, he may also discontinue criminal proceedings that he has instituted, and the courts cannot compel him to institute any criminal proceedings which he does not wish to institute or to go on with any criminal proceedings which he has decided to discontinue.

**[23]** In the light of the above, we have no basis to find that the prosecution had practiced selective prosecution in withdrawing the charge against SP1. The second ground of appeal was therefore not sustainable.

**[24]** Given our earlier finding on the first ground canvassed by Encik Hisyam, we unanimously allowed the appeal and set aside the conviction and sentence. The appellant was acquitted and discharged.